Re Geoffrey Robertson QC

HIGH COURT (KUALA LUMPUR) — ORIGINATING MOTIONS NO R1–17–35 OF 1999 AND R2–17–56 OF 1999
KC VOHRAH J
2 APRIL 2001

Legal Profession *— Admission — Ad hoc — Queen's Counsel — Applicant with his extensive and formidable experience had special qualifications in defamation, media and civil liberties, whether such expertise readily available in Malaysia — Whether quantum of damages for defamation settled law in Malaysia — Whether complex and novel issues requiring expertise of applicant*

The applicant, a Queen's Counsel practising in England, sought to be admitted and enrolled as an advocate and solicitor of the High Court of Malaya under s 18 of the Legal Profession Act 1976 ('the Act'). The solicitors of the first defendant in Civil Suit No S2–23–14–99 ('S2') and the solicitors for the defendant in Civil Suit No S5–22–13–99 ('S5') were instructed to engage the applicant as lead counsel for them in the suits. S2 and S5 concerned claims for damages against the defendants for alleged libel of the plaintiff arising from the publication of an article. The plaintiff disputed that the two civil suits raised complex issues which require the services of the applicant. It was argued that no novel, complicated or serious issues had been raised; that art 10 of the Federal Constitution ('the Constitution') has been the subject matter of decided cases in Malaysia and that the same is not an issue which requires the services of the applicant; that the applicant in any event has no 'special qualification or experience' to argue constitutional issues arising from art 10 of the Constitution as he has not disclosed any particular expertise in the Malaysian Federal Constitution; that the issue pertaining to quantum of damages in defamation cases is settled law in Malaysia and as such the defendants could not be said to require the expertise possessed by the applicant in this field. The plaintiff also disputed that for the purpose of the particular cases, the applicant possesses any special qualifications or experience of a nature not available amongst advocates and solicitors in Malaysia.

Held, allowing the application:

(1) There was no dispute, as disclosed in the verifying affidavits, that the applicant is accepted in England, in America and the British Commonwealth as being a leading barrister and a leading scholar in the area of defamation, media and civil liberty laws. The court had no doubt that the applicant with his extensive and formidable experience had special qualifications in the field of defamation, media and civil liberties law (see pp 314F, 315G, 316A).

(2) Clearly there were complex issues posed by the two civil suits whether the defence of qualified privilege should also be extended or liberalized in this jurisdiction and whether this extension

would be consonant with our art 10 of the Constitution. In addition there was the novel issue in Malaysia whether the publication of the said article in jurisdictions other than Malaysia are actionable in Malaysia. Then there was also the novel issue whether the role played by or the assistance given *The Star* makes *The Star* liable as a 'printer' at common law and whether *The Star* should be held liable for the publication within Malaysia (see p 318D–F).

(3) As to the argument that the quantum of damages has been settled by case law, the court had grave hesitation to conclude that the matter is closed. The court agreed with the submission that the applicant's 'special expertise and qualifications' in the area of defamation laws would give him an edge with respect to leading the argument on the issue of the proper quantum of damages to be awarded to a plaintiff in a libel action (see pp 318I, 319B).

(4) There could be no doubt whatsoever that there are excellent lawyers in our country who have expertise in the area of law relating to defamation, the media and civil liberties. But these lawyers are not specialists in or devoted to these particular areas of law. The court found that the applicant possesses special qualifications and experience of a nature not really available amongst advocates and solicitors in practice in Malaysia (see pp 319E, 320A).

[Bahasa Malaysia summary

Pemohon, yang merupakan seorang Queen's counsel yang berkhidmat di England, memohon ingin diterima dan didaftarkan sebagai seorang peguambela dan peguamcara Mahkamah Tinggi Malaysia di bawah s 18 Akta Profesyen Guaman 1976 ('Akta tersebut'). Peguamcara defendan pertama dalam Guaman Sivil No S2–23–14–99 ('S2') dan peguamcara defendan dalam Guaman Sivil No S5–22–13–99 ('S5') diarahkan mengambil khidmat pemohon sebagai peguam utama mereka dalam guaman-guaman tersebut. S2 dan S5 adalah berkaitan dengan tuntutan gantirugi terhadap defendan-defendan untuk dakwaan libel yang timbul dari penerbitan satu artikel. Plaintif mempertikaikan bahawa dua guaman sivil tersebut mewujudkan isu-isu yang rumit yang memerlukan perkhidmatan pemohon. Ia dihujahkan bahawa tiada isu yang baru, rumit atau serius telah dikemukakan; bahawa perkara 10 Perlembagaan Persekutuan ('Perlembagaan') pernah menjadi perkara kes-kes yang telah diputuskan di Malaysia dan bahawa ia bukan satu isu yang memerlukan perkhidmatan pemohon; bahawa pemohon tidak mempunyai apa-apa 'kelayakan atau pengalaman khas' untuk membincangkan isu-isu perlembagaan berkenaan perkara 10 Perlembagaan kerana beliau tidak mendedahkan apa-apa kepakaran khas dalam Perlembagaan Persekutuan Malaysia; bahawa isu yang melibatkan lingkungan gantirugi dalam kes-kes fitnah adalah undang-

undang mantap di Malaysia dan oleh itu defendan-defendan tidak boleh dikatakan memerlukan kepakaran pemohon dalam bidang ini. Plaintif juga mempertikaikan bahawa bagi tujuan kes-kes tertentu, pemohon memiliki apa-apa kelayakan atau pengalaman khas yang tidak terdapat pada peguambela dan peguamcara di Malaysia.

Diputuskan, membenarkan permohonan tersebut:

(1) Terdapat tiada pertikaian, seperti yang didedahkan dalam afidavit penentusahan, bahawa pemohon diterima di England, Amerika dan negara-negara Komanwel sebagai seorang peguambela yang unggul dan seorang cendekiawan utama dalam soal fitnah dan undang-undang kebebasan media dan kebebasan awam. Mahkamah tiada keraguan bahawa pemohon, dengan pengalamannya yang luas dan mengkagumkan, mempunyai kelayakan khas dalam bidang fitnah dan undang-undang kebebasan media dan kebebasan awam (lihat ms 314F, 315G, 316A).

(2) Jelasnya terdapat isu-isu rumit yang dikemukakan oleh dua guaman sivil tersebut yang melibatkan soal sama ada pembelaan perlindungan bersyarat patut dilanjutkan atau diberi kelonggaran dalam bidangkuasa ini dan sama ada lanjutan ini selaras dengan perkara 10 Perlembagaan. Tambahan pula, terdapat isu baru di Malaysia sama ada penerbitan artikel tersebut dalam bidang kuasa selain daripada Malaysia boleh didakwa di Malaysia. Terdapat juga isu baru sama ada peranan yang dimainkan oleh, dan bantuan yang diberikan oleh, akhbar *The Star* menyebabkan *The Star* turut bertanggungjawab bagi penerbitan di dalam Malaysia (lihat ms 318D–F).

(3) Berkenaan penghujahan bahawa lingkungan gantirugi telah diselesaikan oleh kes-kes duluan, mahkamah ragu-ragu untuk membuat kesimpulan bahawa perkara ini dianggap selesai dan tidak boleh dibicarakan lagi. Mahkamah bersetuju dengan hujahan bahawa 'kepakaran dan kelayakan khas' pemohon dalam soal undang-undang fitnah akan memberikannya kelebihan dalam mengemukan hujahan mengenai isu lingkungan gantirugi yang sesuai yang patut diberikan kepada plaintif dalam satu tindakan libel (lihat ms 318I, 319B).

(4) Terdapat tiada keraguan sama sekali bahawa terdapat peguam yang cemerlang dalam negara ini yang mempunyai kepakaran dalam bidang undang-undang berkenaan fitnah, undang-undang kebebasan media dan kebebasan awam. Tetapi para peguam ini bukannya pakar dalam, atau berjurusan khusus dalam, bidang-bidang undang-undang ini. Mahkamah mendapati bahawa pemohon mempunyai kelayakan dan pengalaman khas yang tidak boleh didapati di kalangan peguambela dan peguamcara yang berkhidmat di Malaysia (lihat ms 319E, 320A).]

Notes

For cases on ad hoc admission, see 9 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1345–1363.

Cases referred to

AG v Wain & Ors [1991] 2 MLJ 525 (refd)
Ahmad bin Said v Zulkiflee bin Bakar [1997] 5 MLJ 542 (refd)
Albert Reynolds v Times [1998] 3 All ER 961 (refd)
Albert Reynolds v Times Newspapers [1999] 4 All ER 609 (refd)
Berezovsky and Glouchkov v Forbes Inc & Anor Times, 27 November 1998 (refd)
Bowman v UK [1998] 1 CLY 1 (refd)
Chadha & Osicom v Dow Jones Inc [1999] CLY 283 (refd)
Goodwin v UK (1996) 22 EHRR 123 (refd)
Institute of Commercial Management (UK) v New Straits Times Press (M) Bhd [1993] 1 MLJ 408 (refd)
Lange v Australian Broadcasting Corp (1997) 189 CLR 520 (refd)
Lee Kuan Yew v Chin Vui Khen & Anor [1991] 3 MLJ 49 (refd)
Lee KuanYew v Derek Gwyn Davies & Far Eastern Economic Review [1990] 1 MLJ 390 (refd)
Pratt & Morgan v AG of Jamaica [1994] 2 AC 1 (refd)
Pustaka Delta Pelajaran Sdn Bhd v Berita Harian [1998] 6 MLJ 529 (refd)
Rees v Crane [1994] 2 AC 173 (refd)
Reynolds v Times [1998] 3 WLR 862 (refd)
Saif Al Islam Gaddafi v Telegraph Group Ltd [2000] EMLR 43 (refd)
Tolstoy Miloslavsky v UK [1995] 1 CLY 458 (refd)

Legislation referred to

Advocates and Solicitors Ordinance 1947 s 8A
Federal Constitution art 10(1)(a), (2)(a)
Legal Profession Act 1976 s 18(1)(a), (2)

Gurmeet Kaur (*Bhag Singh* with him) (*Shafee & Co*) for the applicant in Originating Motion No R1–17–35 of 1999.

Ahmad Kamal (Senior Federal Counsel) for the Attorney General's Chambers, *Edmund Bon* for the Bar Council and *Yasmeen Shariff* for the Kuala Lumpur Bar Committee in Originating Motion No R2–17–56 of 1999.

R Thayalan (*Ashok Vijay* with him) (*VK Lingam & Co*) for the plaintiff in Civil Suits No S2–23–14 of 1999 and No S2(S5)–23–13 of 1999.

KC Vohrah J. : There are two applications before me by Mr Geoffrey Robertson ('the applicant'). He is a Queen's Counsel practising in England and he seeks to be admitted and enrolled as an Advocate & Solicitor of the High Court Malaya under s 18 of the Legal Profession Act 1976 ('the Act').

The solicitors of the first defendant in Civil Suit No S2–23–14–99 ('S2') and the solicitors for the defendant in Civil Suit No S2 (S5)–23–13–99 ('S5') were instructed to engage the applicant as lead counsel for them in the said suits.

Both suits filed in the Civil Division of the Kuala Lumpur High Court by the same plaintiff, Tan Sri Vincent Tan Chee Yiou ('Vincent Tan'), concern a libel claim arising from an article published in the 21 December 1998 edition of the *Asia Wall Street Journal* ('*AWSJ*').

In s 2, Professor Jomo Kwame Sundram ('Jomo') is the first defendant. He is being sued as the writer of the said article. There are four other defendants in that suit.

In s 5, the defendant is *Star Papyrus Printing Sdn Bhd* ('*The Star*'). It is being sued in its capacity as the printer of *AWSJ*.

These two applications for admission are by way of originating motion and both the motions filed in the appellate and Special Powers Division of the High Court were ordered by the Chief Judge of Malaya to be heard by this court as the applicant is the same person and both applications involve civil suits in respect of alleged libel of the same plaintiff and arising from the same article.

Issues in the civil suits

Before I go further, there is a need to sketch out the salient features of both the civil suits, S2 and S5, and the issues raised therein. S2 and S5 concern claims for damages against Jomo and *The Star* respectively for alleged libel of the plaintiff, Vincent Tan, arising from the publication of an article entitled *Malaysia Props Up Crony Capitalists*. Jomo is being sued in his capacity as the writer of the said article while *The Star* is being sued in its capacity as printer of the *AWSJ* within this jurisdiction.

In the respective writs and statements of claim filed by the plaintiff, in S2 and S5, the averments are largely identical. The plaintiff essentially pleads that the said article is defamatory of him.

The plaintiff in particular avers that certain pleaded passages of the said article carry defamatory meanings.

Within both statements of claim, the plaintiff also pleads that the said article is actionable in several other countries including in Australia, China, Hong Kong, Indonesia, Japan and Singapore. And the claims by the plaintiff are, in S2 against Jomo and four others, RM250m as damages for libel and in S5 against *The Star*, RM200m as damages for libel.

In S5, The Star has pleaded the following defences:

(i) a denial of any liability as 'printer' for the said publication;

(ii) a denial of any liability for publication in any jurisdiction other than Malaysia as *The Star* has no role to play in the' publication of the *AWSJ* in any other jurisdiction apart from Malaysia;

(iii) a denial that the publication in countries other than Malaysia attracts any liability under Malaysian law;

(iv) a denial of any liability in libel under Malaysian law;

(v) a denial of the meanings pleaded by the said plaintiffs;

(vi) justification;

(vii) fair comment;

(viii) qualified privilege at common law;

(ix) and following from (vii) and (viii) above, the defence of freedom of speech and expression guaranteed by art 10 of the Constitution.

All of the defences save for those listed under (i) and (ii) above have also been pleaded in S2 against Jomo. It seems clear that the matters and issues arising from the civil suits for determination by a trial court or courts in the Civil Division include the following:

(i) Is there a cause of action in defamation?

(ii) Can the plaintiff establish liability against Jomo and *The Star* for publication in any jurisdiction apart from Malaysia? And are the extra territorial publications actionable under the laws of Malaysia? This would also bring up the forum conveniens issue.

(iii) Is the defence of justification or of fair comment or of qualified privilege made out? In determining these issues, the court will also have to consider:

(a) constitutional issues such as art 10 of the Federal Constitution ('the Constitution') which guarantees the freedom of speech and expression;

(b) the interaction of the applicable libel laws in the country with the fundamental civil liberties provided and guaranteed by the Constitution, ie art 10(1)(a) read with art 10(2)(a);

(c) the scope of the qualified privilege defence at common law bearing in mind that this area of the law of defamation has seen recent developments in other Commonwealth jurisdictions, such as in England, Australia and New Zealand.

(iv) What is the appropriate quantum of damages bearing in mind that disproportionately high awards are a fetter on the freedom of expression?

The originating motion and s 18 of the Legal Profession Act 1976

Both the motions have been filed under s 18 of the Act

Section 18 of the Act reads as follows:

> Admission in special cases
>
> (1) Notwithstanding anything contained in this Act, the Court may, for the purpose of any one case and subject to the following subsections, admit to practise as an advocate and solicitor any person who, if he was a citizen of, or a permanent resident in Malaysia, would be eligible to be admitted as an advocate and solicitor of the High Court and no person shall be

admitted to practise as an advocate and solicitor under this subsection unless:

(a) for the purpose of that particular case he has, in the opinion of the court, special qualifications or experience of a nature not available amongst advocates and solicitors in Malaysia; and

(b) he has been instructed by an advocate and solicitor in Malaysia.

(2) Any person applying to be admitted under this section shall do so by originating motion verified by his own affidavit, or that of the advocate and solicitor instructing him, stating the names of the parties and the brief particulars of the cause or matter in which the applicant intends to appear, and exhibiting in the affidavit the consent of the applicant to appear in the cause or matter; the originating motion and affidavit or affidavits shall be served on the Attorney General, the Secretary of the Bar Council and of the State Bar Committee in the State where such cause or matter is to be heard and the other party or parties to the cause or matter; at the time of such service the applicant shall pay one hundred ringgit each to the Secretary of the Bar Council and of the State Bar Committee to cover their costs incurred in the application.

(3) Before admitting a person under this section, the court shall have regard to the views of each of the persons served with the application.

(4) ...

(5) ...

(6) In this section the words 'cause or matter' include any interlocutory or appeal proceedings connected with any cause or matter.

The predecessor provision of s 18 of the Act under the repealed Advocates and Solicitors Ordinance 1947, s 8A, has been the subject of judicial interpretation in several cases. As has been pointed out in the Federal Court in *Graham Starforth Hill v The Bar Council of Malaya & Anor* [1972] 1 MLJ 178, an applicant for ad hoc admission under s 8A of the Advocates and Solicitors Ordinance, for the purpose of one case only, has to satisfy four conditions: (a) that he is a person who if he was a citizen of Malaysia or a permanent resident in Malaysia would be a qualified person within the meaning of the Ordinance; (b) that he has been instructed by an advocate and solicitor in Malaysia; (c) that for the purpose of that particular case he has, in the opinion of the court, special qualifications or experience; of a nature; and (d) that such special qualifications or experience are of a nature not available amongst advocates and solicitors in Malaysia.

The same four conditions have been repeated in s 18 of the Act but there is an additional condition contained in s 18(2) of the Act which is that the applicant's consent to appear in the cause or matter must be exhibited in the affidavits verifying the motions.

It is not disputed that the applicant satisfies all the conditions save that the Attorney General in affidavits filed by officers in the Attorney General's Chambers in September and October last year and Vincent Tan in an affidavit filed by an Advocate and Solicitor in September 1999 dispute that for the purpose of the particular cases, S1 and S5 , the applicant possesses any special qualifications or experience of a nature not available amongst advocates and solicitors in Malaysia. They however do not dispute any of

his accomplishments that have been listed in the affidavits supporting the motions.

The Bar Council and the Kuala Lumpur Bar Committee do not object to the applications herein. In fact, they support the applications.

Whether applicant has special qualifications or experience

As to what is meant by the words 'special qualifications, knowledge or experience of a nature not available amongst advocates and solicitors in Malaysia', these words also appeared in s 8A of the Advocates and Solicitors Ordinance,1947 and the interpretation of Sharma J in *Lee Wong Tiong v PP, Re SK Lee* [1971] 2 MLJ 40 is instructive. He observed in respect of the words 'special qualifications and experience':

> The word 'qualification' used in s 8A(2)(a) denotes an accomplishment or a quality and the adjective 'special' qualifying indicates that the accomplishment contemplated should be of an exceptional degree or such that excels in some way the measure of accomplishments reached by the advocates and solicitors of Malaysia. As I read sub-s (2)(a), the applicant should be such a person who, as a lawyer and on the evidence before the court, exhibits distinguished qualities or is devoted to a particular branch or field of law. Instances would be of persons who specialize, for example, in income tax law, or trade marks, divorce practice, shipping law, etc and have achieved such heights in the exercise of their profession that they stand out as great luminaries in the firmament of law. The list of such examples can by no means be exhaustive. It all depends upon the particular qualifications a particular lawyer has or the particular subject to which he has devoted himself. There may be, for example, instances where the lawyer exclusively practices before the highest courts of the land, or the highest appellate courts of the various countries of the Commonwealth or other lands where the law is similar to our own.

There is no dispute that, as disclosed in the verifying affidavits, that the applicant who was admitted to the Bar of England and Wales in 1973 had a distinguished academic career — he was a Rhodes Scholar and he obtained his BCL from Oxford. He has been in practice for about 27 years and is the head of his set of chambers, Doughty Street Chambers. He was appointed a Queen's Counsel in 1988, an assistant recorder in 1993 [he is now a recorder] and in 1997 he was made a Master of the Bench of Middle Temple. He was admitted to practise in other Commonwealth jurisdictions, at the Bar of New South Wales and Australia, the Bar of Trinidad and Tobago, Antigua and for specific cases only at the Bar of Singapore and the Bar of Hong Kong.

He is also a reputed scholar and was made a Visiting Professor at the reputed Birkbeck College, University of London, at the University of New South Wales and the University of Warwick. And he had been regularly invited to deliver lectures organized by the American Bar Association.

The applicant is also a published author. He co-authored a leading textbook on media law entitled *Media Law* [1989] (3rd Ed) with Andrew

Nicol QC and was the author of the chapter on defamation appearing therein. He also co-authored a text, *Freedom: The Individual and the Law* (1989, 6th Ed) and (1993, 7th Ed). He wrote *People Against the Press*, a reputed and detailed study of defamation and alternative remedies.

The applicant has specialized in media, constitutional and defamation laws and has appeared and argued landmark cases in these areas of law in the House of Lords, the Privy Council and the European Court of Human Rights and other courts in the Commonwealth, amongst which are *Goodwin v UK* (1996) 22 EHRR 123 (media law); *Bowman v UK* [1998] 1 CLY 1 (art 10 of the European Convention on Human Rights and its interaction with election laws in the United Kingdom); *Pratt & Morgan v AG of Jamaica* [1994] 2 AC 1 (Privy Council appeal from Jamaica on human rights and fundamental freedoms and the infringement of constitutional rights); *Rees v Crane* [1994] 2 AC 173 (Privy Council appeal from Trinidad and Tobago on constitutional issues and the removal of Judge from office); *Berezovsky and Glouchkov v Forbes Inc & Anor* [Times, 27 November 1998] (Court of Appeal UK) (extent of circulation of publication and whether sufficient to found a cause of action in England and forum conveniens); *Chadha & Osicom v Dow Jones Inc* (Court of Appeal UK) [1999] CLY 283 (extent of circulation of publication and whether sufficient to found a cause of action in England and forum conveniens); *Saif Al Islam Gaddafi v Telegraph Group Ltd* [2000] EMLR 43 (defence of qualified privilege post *Reynolds v Times* [1998] 3 WLR 862).

In the Ad Hoc Admissions in Singapore, he appeared in *Lee KuanYew v Derek Gwyn Davies & Far Eastern Economic Review* [1990] 1 MLJ 390 (a case on defamation, since referred to and/or followed by our courts in *Institute of Commercial Management (UK) v New Straits Times Press (M) Bhd* [1993] 1 MLJ 408; *Pustaka Delta Pelajaran Sdn Bhd v Berita Harian* [1998] 6 MLJ 529; *Ahmad bin Said v Zulkiflee bin Bakar* [1997] 5 MLJ 542)). He also appeared in three other cases.

In addition the applicant was appointed as an advisor to the previous Australian Government on defamation matters and more recently was invited to conduct a special inquiry in Mauritius on the country's media laws at the behest of the Mauritian Government.

The applicant is accepted in England, in America and the British Commonwealth as being a leading barrister and a leading scholar in the area of defamation, media and civil liberties laws. In fact, the applicant is given full recognition as being one of the top barristers in England specializing in the area of defamation, media and civil liberty laws.

In the context of Malaysia, it will be remembered that the Bar Council and the Bar Committee, bodies interested in promoting and safeguarding the interests of advocates and solicitors in the states of Malaysia and in Kuala Lumpur respectively, support his applications for admission and as a measure of confidence, the Bar Council in fact, invited him to deliver and he delivered a lecture on 18 May 1999 in Kuala Lumpur entitled *Developments Pertaining to Media Law with Special Reference to Defamation and Contempt* and to attend the XII Commonwealth Conference held in

Kuala Lumpur in September 1999 where the applicant spoke on various topics concerning defamation, contempt of court and civil liberties.

I have no doubt that the applicant with his extensive and formidable experience has special qualifications in the field of defamation, media and civil liberties law. It is also very apparent that the United Kingdom and other Commonwealth jurisdictions, in particular, Australia, Hong Kong, Singapore and Mauritius as well as the United States of America have given significant recognition to and acceptance of the applicant's special expertise in these areas of the law.

Whether special qualifications or experience not available amongst advocates and solicitors in Malaysia

Sharma J observed as what is required to be fulfilled in regard to the second aspect in relation to the special qualifications and experience, that they are 'of a nature not available amongst advocates and solicitors in Malaysia' at pp 40–41:

> The words 'not available' used in sub-s (2)(a) seem to mean 'not obtainable.' It would thus seem that it is the excelling virtue born of the applicant's special qualifications or experience that has got to be considered and that excelling virtue must be such as outclasses the excellence to be found in the local lawyers. The special qualifications or experience are required to be of a quality and type which cannot be had amongst the advocates and solicitors in Malaysia. The applicant may have special qualifications or experience but that alone does not seem to be sufficient under the statute. He has to go further and satisfy the court that the special qualifications he possesses or the experience he professes to have are comparatively of such a type and character that no advocate and solicitor practising in Malaysia can be said to possess or equal that high degree of accomplishment which has been acquired or exhibited by the applicant. I have said earlier that in my view, s 8A seems apparently aimed to facilitate the admission of those members of the Bar from other countries who have attained renown and distinction.

Before I proceed to discuss further and determine whether the applicant has satisfied the second aspect of s 18(1)(a) of the Act, let me deal with the dispute by the Attorney General (see affidavits filed in September and October last year) and by Vincent Tan that these two civil suits raise complex issues which require the services of the applicant. It has been argued that no novel, complicated or serious issues have been raised; that art 10 of the Constitution has been the subject matter of decided cases in Malaysia and that the same is not an issue which requires the services of the applicant; that the applicant in any event has no 'special qualifications or experience' to argue constitutional issues arising from art 10 of the Constitution as he has not disclosed any particular expertise in the Malaysian Federal Constitution; that the issue pertaining to quantum of damages in defamation cases is settled law in Malaysia and as such, Star and Jomo cannot be said to require the expertise possessed by the applicant in this field.

It has to be pointed out that although s 18(1)(a) of the Act does not require the applicant to show that the civil suits for which his services are

required disclose 'novel', 'serious' or 'complex issues', there are indeed complex issues to be decided in this jurisdiction. There is the complex issue whether the defence of qualified privilege in our jurisdiction should follow the developments of the said defence in England, Australia and New Zealand. These are the uncharted areas as to what the ambit and scope of art 10 of the Constitution is and how the said article interacts with the law of defamation. Then there is the serious issue as to how the courts should view the question of damages in the light of foreign case law on the need to restrict disproportionately high awards which restrict the right to free expression.

The scope of qualified privilege defence has undergone extensive changes in the Commonwealth jurisdictions namely in England, Australia and New Zealand. It would appear that the following decisions in the said respective jurisdictions now determine the ambit of the said defence as follows:

(i) In England

In *Albert Reynolds v Times Newspapers* [1999] 4 All ER 609, the House of Lords recognized the extension of the scope of the qualified privilege defence to include generally published statements provided that the 'circumstances' 'of publication merit such protection. The House of Lords further stated that the courts should pay special attention to the importance of freedom of speech and expression and should be slow to conclude that a publication was not made in the public interest. It will be up to the trial court or courts to apply the test as expounded in the Court of Appeal decision in *Albert Reynolds v Times* [1998] 3 All ER 961, wherein the Court of Appeal upon considering the decisions in Australia and New Zealand and art 10 of the European Convention on Human Rights recognized that the common convenience and welfare of the modern plural democracy was best served by ample flow of information on matters of public interest to the community and that in maintaining a proper balance between the freedom of speech and a public figure's right to his reputation, the defence of common law qualified privilege was available where:

(a) the defendant had a legal, moral or social duty to publish the information to those (including the general public) who had a corresponding interest to receive the information; and

(b) that the above test would be more readily satisfied than previously having regard to the following factors:

(i) nature, status and source of the information;

(ii) circumstances of the information.

(ii) In Australia

Australia too appears to have departed from the old English common law position by recognizing an implied freedom within its constitution which allows for the 'freedom of communication on matters pertaining to government and politics'. This was established in the case of *Lange v Australian Broadcasting Corp* (1997) 189 CLR 520.

(iii) In New Zealand

In *Lange v Atkinson* [1998] NZLR 424, the New Zealand Court of Appeal recognized the need to extend the boundaries of the qualified privilege defence to statements published generally in light of the provisions of the Bill of Rights Act 1990 and to a large extent adopted the Australian High Court decision but decided not to adopt the 'reasonableness test' therein as being part of New Zealand law.

It will therefore be noted that while all of the abovementioned Commonwealth jurisdictions have accepted the need to extend the boundaries of the qualified privilege defence to statements published generally, the manner in which the 'new' test has been stated varies in each of the said cases. It is further pertinent to note that the developments in Australia and New Zealand placed great emphasis on their respective written Constitution or Bill of Rights Act 1990 wherein the freedom of expression and speech is guaranteed as a fundamental liberty. The applicant has shown himself to be a specialist in these areas, ie defamation and civil liberties and these matters in the context of constitutional law as pointed out earlier.

Clearly there are complex issues posed by the two civil suits whether the defence of qualified privilege should also be extended or liberalized in this jurisdiction and whether this extension would be consonant with our art 10 of the Constitution.

In addition, there is the novel issue in Malaysia whether the publication of the said article in jurisdictions other than Malaysia are actionable in Malaysia. The applicant appeared as counsel in *Chadha & Osicom v Dow Jones* and *Berezovksy v Forbes* [1999] CLY 283 [Times, 27 November 1998] where the issue was raised.

Then there is also the novel issue whether the role played by or the assistance given by *The Star* makes *The Star* liable as a 'printer' at common law and whether *The Star* should be held liable for the publication within Malaysia. It had to be noted that in the Singapore case of *AG v Wain & Ors* [1991] 2 MLJ 525, the applicant appeared as counsel to argue the liability of the printers therein for contempt of court.

As to the argument that the applicant has no expertise to argue on art 10 of the Constitution, it has to be noted that the only decision pertaining to the interaction between the said article and defamation in our jurisdiction is the decision of *Lee Kuan Yew v Chin Vui Khen & Anor* [1991] 3 MLJ 494, but the decision considered only a limited aspect of the interaction and the decision was for an interlocutory application. The full scope and impact of art 10 (in the context of defamation cases) in our jurisdiction remains uncharted and, at the very least, is an issue which requires full and further argument. In this respect, it is pertinent to keep in mind the fact that the applicant is renowned and has special qualifications or experience in the area of freedom of expression as pointed earlier.

As to the argument that the quantum of damages has been settled by case law, I have grave hesitation to conclude that the matter is closed.

As was pointed out by the affidavits in support of the motions, the 'current trend of exorbitant amounts' given by way of damages in defamation cases gives rise for concern and lends extra need 'for guidance in determining the scope of the public right of freedom of speech', a matter of public interest and widely debated in Malaysia.

I agree with submission that the applicant's 'special expertise and qualifications' in the area of defamation laws would give him an edge with respect to leading the argument on the issue of the proper quantum of damages to be awarded to a plaintiff in a libel action. The applicant's special expertise in defamation will undoubtedly be of assistance and his understanding and experience in dealing with the European Convention of Human Rights will put him in a better stead to argue on far reaching concepts relating to freedom of expression in the light of case law including the case of *Tolstoy Miloslavsky v UK* [1995] 1 CLY 458. In that case, it was held by the European Court of Human Rights that the United Kingdom system whereby the jury set the amount of the award for non-financial damage using fairly unrestricted discretion, contravened art 10 of the European Convention of Human Rights because insufficient safeguards were provided to prevent disproportionately high awards.

I now come to the question relating to the second aspect of s 18(1)(a) of the Act, whether the applicant possesses special qualifications or experience not available amongst advocates and solicitors in Malaysia. I think in this context, there can be no doubt whatsoever that we have excellent lawyers in our country who have expertise in the area of law relating to defamation, the media and civil liberties. But these lawyers are not specialists in or devoted to these particular areas of law. For a long time, there were only a few defamation cases in our courts. Our lawyers did not really have the opportunity to involve themselves in depth in these areas of law or to keep abreast of the latest developments therein or to have honed their forensic skills on defamation cases. It is only over the last few years, however, there have been a spate of defamation cases, all with huge claims for damages, which have been filed including these two suits and most of them have yet to be heard. These two cases raise particularly complex issues as has been shown relating to the law of defamation, the media and civil liberties. It is therefore not surprising that the then Secretary of the Bar Council in his affidavit stated this:

> The Bar Council verily believes that the applicant has vast experience in the area of defamation and media law and that he possesses special qualifications and experience not readily available amongst advocates and solicitors presently in practice in Malaysia ...

The applicant has been immersed in defamation, media and civil liberties law for a considerable length of time as a QC. He has had the advantage of being involved as an advocate in other jurisdictions relating, again, to these areas of law and has acquired a greater depth of knowledge and understanding, on a comparative basis, in such areas. He is a scholar and has written and lectured extensively on these areas of law. He certainly has a distinct and clear advantage over our own excellent lawyers in this

country. Our Bar Council has acknowledged this and Bar Committee implicitly so. They did not dispute the accomplishments stated in the affidavits supporting the motions — in fact they support the applications. In my view, the applicant possesses special qualifications and experience of a nature not really available amongst advocates and solicitors in practice in Malaysia and I admit the applicant to practise as an advocate and solicitor for the purposes of S2 and S5.

Application allowed.

Reported by Jafisah Jaafar